No. 05-182

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF WISCONSIN – PETITIONER

VS.

RICHARD A. MOECK – RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Wisconsin Supreme Court contravene *Arizona v. Washington*, 434 U.S. 497 (1978) by holding that the trial court failed to exercise sound discretion in granting a mistrial in a case in which the defense opening argument summarized, in good faith, the anticipated testimony of the defendant and where the defendant ultimately decided to not testify?

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SUMMARY OF ARGUMENT

Review should be denied because the Wisconsin Supreme Court carefully adhered to this Court's standards for appellate review of mistrial decisions set forth in *Arizona v. Washington*, 434 U.S. 497 (1978). Consistent with *Washington*, the Wisconsin court first determined the proper level of deference to accord the trial court decision, based on the nature of the circumstance giving rise to the mistrial. The Wisconsin court concluded that a high level of deference, "special respect," should be accorded the trial court because, as in *Washington*, the mistrial decision was related to the defense opening argument. The Wisconsin court then addressed, as required by *Washington*, whether "sound discretion" was exercised by the trial court, concluding that "sound discretion" was not exercised because the trial court erred as a matter of law with regard to the prosecutor's ability to effectively address, in closing argument, the failure of the defense to produce the admissible testimony anticipated in the defense opening statement. Following *Washington*, the Wisconsin Supreme Court could have relied on additional grounds for reversing the mistrial decision, including that the trial court erred in finding that the defense opening statement was improper, that there was substantial reason to believe that the State sought a mistrial to salvage a failed prosecution, that the trial court erroneously delegated the mistrial decision to the prosecutor, and that the trial court failed to act deliberately by allowing the parties an opportunity to research and explain the legal authorities relevant to the mistrial decision.

Review should also be denied because no conflict whatever exists between federal jurisdictions or State courts with regard to mistrials granted after the defense, in good faith, summarizes anticipated, admissible testimony of a defendant in an opening argument but then fails to call the defendant to testify. The State has not produced a single appellate case from any State or federal court that has been decided contrary to the Wisconsin Supreme Court's decision. Of the few cases that have addressed this issue, each has been decided consistently with the decision in Moeck's case. The supposed "conflict" among the circuits and States that the petition outlines, using cases that address mistrial decisions based on a broad variety of trial errors, actually reflects that appellate courts are *following* the mandate of *Arizona v. Washington*, and determining what level of deference, along a spectrum ranging from "strict scrutiny" to "great deference," should be accorded a mistrial decision, based on the nature of the circumstance giving rise to the mistrial request.

Finally, review should be denied because no issue of national importance is presented. Lawyers frequently present, in good faith, opening statements that refer to anticipated, admissible testimony that, for a variety of reasons, is not ultimately produced at trial. No authority exists, either in the cases, recognized practice standards, or academic literature, suggesting that such a development at trial might be grounds for a mistrial.

STATEMENT OF THE CASE

The State's presentation of evidence at Moeck's third jury trial was a disastrous failure of proof. As with many sexual assault allegations, the case against Moeck rested entirely on the credibility of the complainant, Christopher Sader. The State also presented testimony by a patrolman, Officer Abraham, the sole investigator of the allegation, who uncovered no physical evidence or other corroboration of Sader's account. This failure of proof is the essential factual background for understanding Moeck's decision that he need not testify, and the State's decision to accept the trial court's offer to grant a mistrial if the State desired one: both Moeck and his counsel and the State realized that the State had failed to prove its case. Notably, the State's petition to this Court completely ignores this essential factual setting.[1]

Testimony of the Complainant

The complainant, Christopher Sader, was a 23 year old probationer at the time of the alleged incident (R244:115, 158), with five prior criminal convictions (R233:89), and a history of lying. At Moeck's third trial, Sader testified that in January 1995, he had lied to a police officer about his name; that in February 1995, he lied to an officer about his name, address, date of birth, about whether he had any identification, and about where he had been on two occasions that evening; that in November 1999, he lied in telling an officer that he had fallen asleep in a business

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[1] A cursory review of the cross-examination of both the complainant and the patrolman, appended at A13-136, cannot fail to shed light on Moeck's decision that he need not testify, and on the State's decision to accept the trial court's offer of a mistrial.

establishment while the business was open to the public, about whether or not he could move his hands and legs, about whether he was too drunk to walk, and about whether he needed an ambulance to transport him to the hospital; and that he lied to a potential roommate with regard to his prior criminal record (A83-86).

At Moeck's third trial, Sader had given sworn testimony at a preliminary hearing and two prior trials, in addition to his oral and written statements to police. During cross-examination, Sader acknowledged inconsistencies with regard to at least 15 aspects of his testimony about the incident, including whether he was walking or riding his bike when he met Moeck (A18), whether he met Moeck north or south of Tom's Turkey bar (A19), whether he approached Moeck before or after Moeck spoke to him (A24), whether he went to Moeck's apartment to drink beer with Moeck or to party and play pool with a bunch of other people (A32); which couch he sat on after he arrived at Moeck's apartment (A38-39); whether he rather than Moeck turned the TV on at the apartment (A41-42); whether he was laying on his back or his side while he looked at "nude" magazines (A48); whether Moeck's jeans were down to his ankles or completely off during the alleged assaults (A47); whether he looked at only one or at a handful of "nude" magazines during the alleged assault (A51-53); whether he was standing up or laying down during the first alleged sexual assault (A54); whether the robbery occurred while he was on the mattress (in between instances of alleged sexual contact) or at the very end of the alleged incident while he was standing up against a wall (A55-59); whether he was struck by Moeck once every time he looked at Moeck, for a total of about six times, or two or three times every time he

refused Moeck's advances (A65-68); whether he was forced to take one, two, or three puffs of marijuana during the robbery (A68-70); whether he left Moeck's apartment when it was just starting to get light out, or at 7:30 a.m., an hour and half after sunrise (A71); and whether he left Moeck's apartment immediately after getting off the mattress or after standing up against the wall for a half hour (A72-73).

Three of these inconsistencies involved major features of the alleged incidents of sexual assault, robbery, and bat[illegible]y. First, with regard to the sexual assault allegation, Sader testified that he was never standing when fellatio was performed on him (A54). Sader told Officer Abraham, however, that the first instance of fellatio occurred while he was standing naked in front of Moeck, when Moeck positioned himself in front of Sader with the knife at his stomach and did "what girls usually do to guys when the girls on her knees" (A7). Sader told Abraham that, after this, Moeck ordered him onto the mattress and that Moeck then got down on the mattress and started to perform fellatio *again* (A8). Second, with regard to the robbery allegation, Sader testified that he was robbed near the end of the alleged 4 ½ hour ordeal; that Moeck ordered him to get off the mattress and stand against a chest facing the wall for about a half hour; that while thus standing, he could hear Moeck rummaging through his shorts and wallet; and that after the robbery Moeck told him to get dressed (A54-56). At the preliminary hearing, however, Sader testified that he was on the mattress when he was robbed; that after the first instance of fellatio, Moeck ordered him to turn on his side, and that he could hear Moeck going through his wallet and shorts; and that after this, Moeck again performed fellatio (A57-59).

Sader acknowledged that his preliminary hearing testimony was "not the way it happened" (A57). Third, with regard to the battery allegation, Sader testified at the third trial that he was slapped "close to half a dozen times," and that he was struck *once* every time he looked at Moeck (A65). Sader acknowledged that, at the preliminary hearing, he had testified incorrectly that "every time I kept on refusing to him, he hit me like two or three times with the back of his hand" (A65). Sader also acknowledged that his testimony at the first trial, that Moeck didn't hit him every time he looked at Moeck, was incorrect (A67).

Testimony of Officer Abraham

Moeck's decision to not testify at the third trial was made immediately after a withering cross-examination of the "investigating" officer, Robert Abraham (A88-136). Abraham was a third year patrolman who candidly acknowledged he was not an investigator and who could only recall being involved in two prior sexual assault cases (A91-92). Abraham testified that he contacted an investigator on the day Sader reported the offense, but it was a weekend and an investigator was not on duty (A93). He acknowledged that apart from his search of Moeck's apartment on the day of the offense, the only follow up investigation conducted was his interview with Moeck's landlord in January 1998, six months after the offense (A127).

Abraham testified that he requested a search warrant for Moeck's apartment, based on Sader's verbal report of the incident, specifically requesting to search for

drugs and drug paraphernalia, $10 bills, a hacksaw, and a 12-inch knife, and that he found none of these items in the apartment (A115). He testified that he noticed no marks or injuries on Sader, though Sader claimed he was "backhanded" by Moeck on the face six or seven times (A113, 120). Abraham testified that he found no physical evidence whatsoever in Moeck's apartment that would link Moeck to a specific crime (A116). Abraham testified that he never questioned Sader about the inconsistencies between his verbal statement and written statement (A129).

Abraham testified that he never examined or even looked at Sader's genitals even though Sader claimed to have been subjected to four hours of masturbation and fellatio (A128-130). Abraham dropped Sader off at the hospital with a social worker (A114), but did not require anyone at the hospital to conduct a sexual assault examination "because I didn't feel at the time there was really any evidence to collect on his body" (A130). He testified that even though Sader had come to the police station directly from the alleged assault, without showering or changing clothes, he never thought to check for saliva evidence on Sader, and did not collect Sader's underwear. (A131).

Abraham testified that, even though Sader claimed that Moeck had looked through his billfold and at his driver's license, he did not attempt to take any fingerprints from those items (A132). He did not run any drug screen on Sader, though Sader claimed Moeck had forced him to smoke marijuana (A132). He did not search the public bathroom across the hall from Moeck's apartment, other than "just

looking into it" (A133). He did not search Moeck's vehicle for any physical evidence because "I didn't' know he had a vehicle" (A134-35). He didn't search for evidence in the dumpsters behind Moeck's apartment (A117). He didn't speak with any of Moeck's neighbors in the apartment building; didn't speak with any patrolmen who might have been on Third Street that night, where Sader claimed to encountered Moeck; and didn't speak to anyone at Sneaker's Tavern, where Sader claimed to have been prior to the assault (A133-34).

On a scale of one to ten, Abraham rated his investigation of this case a ten (R233:276, A125).

Moeck's Decision to Not Testify

At the close of the State's case in the third trial, Moeck's counsel conferred with Moeck and then announced that the defense would not be presenting evidence (R233:297). The court then questioned Moeck about his decision to not testify, to ensure his waiver of the right to testify was knowing and voluntary (R233:298). The court failed to inform Moeck that, as a result of his decision to not testify, the court would – in only a few short minutes – be granting a mistrial.

At the postconviction hearing, Moeck testified that, prior to the third trial he discussed with his attorney whether or not he would testify, and had decided "that I would testify in the third trial just as I had in the first two trials" (R248:156). Unlike Sader, Moeck had no reason to be concerned that cross-examination would reveal

inconsistencies in his testimony because his prior testimony was consistent. At his first trial, Moeck testified that he had met Sader at a bar about a month prior to this alleged incident and told Sader where he lived and that he might want to buy some marijuana once in a while; that on the night of the alleged incident Sader came to his apartment at about 3:00 a.m. and woke him by knocking on the door; that Sader said he had some marijuana to sell; that Sader seemed intoxicated and told Moeck that he couldn't go home because his father was home and asked if he could stay at Moeck's apartment until morning; that Moeck agreed to this and allowed Sader to stay and told him they would discuss the marijuana in the morning; that in the morning, Moeck woke up Sader and they discussed the sale of an ounce of marijuana for $120; that upon Sader's request, Moeck showed Sader that he had that much money and put a $100 bill and a $20 bill on the table but told Sader that he only wanted about $20 or $30 worth; that Sader said he didn't want to break up the ounce so Moeck told him to keep it; that Moeck went to use the bathroom and, upon returning, noticed that his $120 was missing; that Moeck told Sader to give the money back and Sader denied taking it; that Moeck pushed Sader up against a sink and threatened to hit him at which time Sader returned the money to Moeck, which he had hidden in his shoe; and that Moeck then pushed Sader out of his apartment (R88:180-206). At his second trial, Moeck testified entirely consistently with his testimony from the first trial (R93:210-237).

Moeck stated that he made the decision to not testify as soon as the State rested:

> [W]e won that trial. There was no way that jury was going to convict me of anything, because the alleged victim in this case told so many lies, got caught up in so many lies.
>
> They found there was no investigation done in this matter, and there was no doubt in anybody's mind that we won that case.
>
> R248:156-157.

At the postconviction hearing, Moeck's trial counsel explained the decision to not testify in similar fashion:

> The evidence in the cross examination of the State witnesses went extremely well in that case. And during the course of the trial, there were many, many inconsistencies within Mr. Sader's testimony. The case went very well. At the end of the State's case, the decision was basically made at that point that Rich would not take the stand. That there was no need for him to take the stand.
>
> R248:15.

The Jury Instruction Conference and Mistrial Decision

The prosecutor came to the jury instruction conference with a proposed curative instruction to address defense counsel's opening statement which summarized anticipated testimony by Moeck that was not produced when Moeck decided to not testify (*Pet. App.* at A85-86). The court proposed the following instruction:

> The jury is not to consider any statement of certain facts made in opening statements when such facts were not supported by evidence received during the course of this trial.
>
> (*Pet. App.* at A87-88).

After fashioning the curative instruction, the court and parties also discussed what the proper scope of the prosecutor's closing argument should be, and agreed that the prosecutor could argue that the defendant presented no evidence to back up the assertions in the opening statement, as long as she didn't say that the defendant didn't take the stand and testify to those facts (*Pet. App.* at A88-90). The court then asked the State, "Do you want to go ahead or not?" (*Pet. App.* at A90), indicating that, had the State elected to proceed with the trial, using the proposed curative instruction, the court would have proceeded with the trial. After the State indicated, "I think I'm gonna ask for a mistrial, Judge," and after further comment by defense counsel, the court again indicated that the decision about whether the trial would proceed or not rested entirely in the State's hands. The court asked: "Is that your final answer, Ms. Matousek?" (*Pet. App.*, at A91). When the State responded "yes," the court declared a mistrial.

After the mistrial was declared, Moeck's counsel spoke outside the courthouse with Sergeant Abraham, the investigating officer for the offense and the officer who assisted the prosecutor in the presentation of the State's case, and who indicated that he had done a much better job than Moeck's previous attorney and that that was why the state had requested a mistrial (A6).

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REASONS FOR DENYING THE WRIT

I. The Wisconsin Supreme Court Decision Is Entirely Consistent with This Court's Decision in *Arizona v. Washington.*

A. The *Arizona v. Washington* Review Standard.

This Court should deny review because the Wisconsin Supreme Court decision is entirely consistent with the decision of this Court in *Arizona v. Washington*, 434 U.S. 497 (1978). In *Washington*, this Court set forth a framework for appellate review of a trial court's determination of "manifest necessity" for a mistrial. Under that framework, a reviewing court must first determine the level of deference to be accorded the mistrial decision, based on the circumstances giving rise to the mistrial issue. Second, to ensure the defendant's constitutionally protected right against double jeopardy, a reviewing court must ensure that the trial judge exercised "sound discretion" in granting a mistrial. The Wisconsin Supreme Court carefully adhered to this framework in its review of Moeck's case.

In *Washington*, the defense opening argument informed the jury that, in the previous trial of that case, the prosecutor had hidden, suppressed, and purposefully withheld evidence from the defendant, and that as a result of this misconduct, the Supreme Court of Arizona granted a new trial. *Washington*, 434 U.S. at 499. The prosecutor moved for a mistrial, arguing that any evidence of misconduct by the State in the previous trial was inadmissible. Defense counsel was unable to offer any authority to support the admissibility of the evidence he had referred to in the opening statement. The trial judge ordered a mistrial because the defense lawyer's

opening statement was improper, referring to inadmissible evidence. On federal habeas review, the federal district court concluded that, even though the opening statement was improper, the writ must be granted because the trial court failed to make a finding of "manifest necessity" for a mistrial. The Ninth Circuit affirmed, agreeing that the defense opening statement was improper and that the trial court had failed to find "manifest necessity" or to consider alternatives to a mistrial.

In setting forth the proper framework for appellate review of a mistrial decision in *Washington*, this Court first recognized a spectrum of circumstances giving rise to mistrials. At one end of the spectrum, the Court approved the strictest scrutiny "when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508. At the other end of the spectrum, the Court recognized the need for great deference to a trial judge's determination that a jury is deadlocked. *Id.* at 509-10. The *Washington* Court concluded that, "along the spectrum of trial problems which may warrant a mistrial," a mistrial based on an improper defense opening statement is entitled to "special respect." *Id.* at 510.

The *Washington* Court further recognized that, even in cases requiring "special respect" for the trial court's mistrial decision, a second step of appellate review is necessary to ensure that the defendant's constitutional right against double jeopardy has been adequately protected. The reviewing court must ensure that the trial court

exercised "sound discretion" in granting the mistrial. *Id.* at 514. The Court elaborated that "sound discretion" includes whether the trial judge acted irrationally or irresponsibly, whether the trial judge acted precipitately in response to the prosecutor's request for a mistrial, and whether both counsels were provided full opportunity to explain their positions on the propriety of a mistrial. *Id.* at 515-516.

B. The Wisconsin Supreme Court Carefully Adhered To The *Washington* Review Standard.

In Moeck's case, the Wisconsin Supreme Court carefully and explicitly followed the review standard set forth in *Washington*. The Wisconsin Supreme Court noted that, to determine whether the trial court erred in granting a mistrial, it must examine in turn:

> (A) the constitutional protection against double jeopardy and the manifest necessity standard used to determine whether a mistrial should be ordered; (B) the level of deference to be applied to a circuit court's mistrial order; (C) the circumstances leading up to the granting of the mistrial; and (D) our application of the constitutional principles and standard of review to the circumstances of the case.
>
> *(Pet. App., A9, par. 32)*

The Wisconsin Supreme Court first discussed the double jeopardy protections and set forth the "manifest necessity" standard, citing to *Washington* and other decisions of this Court. The Wisconsin Court then addressed the proper level of deference to be accorded to the trial court in Moeck's case, as required by *Washington*. The Wisconsin Court specifically noted the "spectrum of deference" set forth in *Washington*, and

concluded, consistent with the State's position, that the trial court's decision must be accorded the "special respect" that was applied in *Washington* to the mistrial based on defense counsel's opening statement:

> In cases like the present one, in which a mistrial was ordered on the basis of defense counsel's opening statement, a circuit court's determination "is entitled to special respect."
>
> *(Pet. App., A13, par. 41*, quoting *Washington*, 434 U.S. at 510*)*

After determining the level of deference to accord the trial court's decision, the Wisconsin Court noted, again following and quoting *Washington*, that a reviewing court must also satisfy itself that "sound discretion" was exercised. The Wisconsin Court defined "sound discretion" consistently with *Washington*, noting that it requires acting in a "rational and responsible manner," acting in a deliberate manner, taking time in responding, giving both parties full opportunities to explain their positions and considering alternatives, and noting that "sound discretion" is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law, or does not reason its way to a rational conclusion. *(Pet. App., A13-14, par. 43).*

Applying this *Washington* review framework to Moeck's case, the Wisconsin Supreme Court concluded that, regardless of the level of deference to be applied, the trial court failed to exercise the "sound discretion" required by *Washington*. The Wisconsin Court noted that the State has never contended that Moeck's counsel was engaged in gamesmanship, sandbagging, or acting in "bad faith" when he gave his opening statement, and that the State has not contended that Moeck's counsel had

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any reason to believe that his opening statement would not be supported by admissible evidence (*Pet. App., A20-21, par. 62, 65).*[2] The Wisconsin Supreme Court concluded that the trial court did not exercise sound discretion in granting a mistrial. Citing both this Court's decision in *United States v. Robinson*, 485 U.S. 25, 31-34 (1988) and decisions of the Wisconsin appellate courts in *State v. Keith*, 216 Wis. 2d 61, 80-83 (573 N.W.2d 888 (Ct. App. 1997), *State v. Johnson*, 121 Wis. 2d 237, 247-49, 358 N.W.2d 824 (Ct. App. 1984), and *State v. Edwardson*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988), the Wisconsin Court determined that the trial court erred as a matter of law in concluding that the prosecutor would be unable to effectively countermand the defense opening statement (*Pet. App.*, A23-26, par. 71-77). The Wisconsin Court noted that these decisions uniformly recognize that an accused may "open the door" to a measured response by the prosecutor commenting on the failure of the defense to produce the evidence promised in the opening statement. The Wisconsin Court concluded that, given the latitude allowed under these decisions for the prosecutor to comment on the defense failure to produce anticipated evidence, and given the availability of a curative jury instruction admonishing the jurors that opening arguments are not evidence, the circuit court erred as a matter of law in finding "manifest necessity" for a mistrial (*Petitoner's Appendix, A27, par. 79).*

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[2] Because the case did not raise the issue of a defense lawyer giving an opening statement in "bad faith," the Wisconsin Supreme Court did not address that issue.

The Wisconsin Supreme Court correctly concluded that the trial court erred as a matter of law regarding the prosecutor's ability to countermand the defense opening statement. Had the trial court given the attorneys an opportunity for research and deliberation, it may well have discovered those cases, noted above, indicating that a measured response is permissible. The trial court acknowledged that it had read only two mistrial cases, one involving defense witnesses who committed perjury, and one involving prosecutorial misconduct (A89-90), and on this paltry basis stated, "It's clear, I think, that the Court can grant a mistrial." (A90). The trial court candidly acknowledged that "[t]hat's the best I can do off the top of my head" (A89). Unlike in *Washington*, the trial court provided no opportunity for the attorneys to conduct research and provide guidance to the court on this critical ruling. The Wisconsin Supreme Court correctly concluded that such decision-making does not meet *Washington's* "sound discretion" standard.

The petition is curiously silent with regard to the Wisconsin Court's determination that the trial court failed to exercise "sound discretion" because it erred as a matter of law in concluding that the prosecution could not effectively countermand the defense opening statement. The petition fails to even acknowledge, much less address, the Wisconsin Court's application of the "sound discretion" standard required by *Washington*. Perhaps the State fails to address the Wisconsin Court's application of *Washington's* "sound discretion" standard because, to do so would require the petitioner to acknowledge that the Wisconsin Court *was* closely adhering to the review standards set forth in *Washington*. The petitioner has not

argued that the Wisconsin Supreme Court's determination that the trial court erred as a matter of law on this point was erroneous. Further review by this Court, therefore, is not warranted.

C. The Wisconsin Supreme Court Did Not Conduct a "*De Novo*" Review Of The Trial Court's Mistrial Decision.

The petitioner argues to this Court that the Wisconsin Supreme Court disregarded *Washington* and reviewed the mistrial decision *de novo* (*Petition* at 11-12). In support of this, the petitioner quotes a partial paragraph from the Wisconsin Supreme Court decision, in which the court indicates:

> We must determine whether "the circuit court erred [in the third trial] when it determined that the State met its burden of showing the requisite manifest necessity to support the mistrial order that terminated" the defendant's third trial.
>
> (A9, par. 32).

Nothing in that statement indicates that a *de novo* standard of review will be applied, and the remainer of the paragraph, omitted by the petitioner, reveals that the Wisconsin Court will be following the *Washington* review standard, including a determination of the level of deference to be applied to the trial court's mistrial decision. *Id.* As noted above, the Wisconsin Supreme Court went on to determine, consistent with *Washington*, that the mistrial decision in Moeck's case was entitled to "special respect," similar to the mistrial decision in *Washington*, because both involved

defense opening statements.[3] Nothing in the opinion suggests that the Wisconsin Court was applying a *de novo* standard of review. The petitioner simply disagrees with the Wisconsin Court's conclusion that, even allowing for the "special respect" to the trial court's decision, as required by *Washington*, the trial court did not exercise "sound discretion" as also required by *Washington*.

The petitioner further argues that the Wisconsin Supreme Court "emphasized the high burden that is on the State to justify a mistrial" rather than reviewing the record with deference to the trial judge (*Petition* at 12). The State posits a false dichotomy: a reviewing court, under *Washington*, must recognize that the State bears a high burden of showing "manifest necessity" and must also determine how much deference or scrutiny to give to the trial court's decision. *Washington* recognizes both the high burden on the State, and the need for "special respect" for the trial court's decision in some cases. *Washington* indicates that the burden on the prosecutor to show manifest necessity is "a heavy one" 434 U.S. at 506. The Wisconsin Supreme Court accurately followed *Washington*, recognizing both the heavy burden on the prosecutor to show manifest necessity, and the need for "special respect" for the trial court's decision.

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[3] As noted in part D, the defense opening statement in Moeck, unlike that in *Washington*, was not improper in content, and thus was not even entitled to the "special respect" accorded to it by the Wisconsin Supreme Court.

Because the Wisconsin Court did not review the mistrial decision *de novo*, and because the Wisconsin Court followed *Washington* in giving "special respect" to the trial court's mistrial decision, further review by this Court is not warranted.

D. Under *Arizona v. Washington*, The Trial Court's Mistrial Decision Was Erroneous For Additional Reasons Not Addressed By The Wisconsin Supreme Court.

Because the Wisconsin Supreme Court concluded, pursuant to *Washington*, that the trial court failed to exercise the "sound discretion" because it erred as a matter of law regarding the ability of the prosecutor to address the defense opening statement, the court did not have to address or resolve a number of additional factors indicating that the trial court's mistrial decision was a departure from the standards set forth in *Arizona v. Washington*, including that the trial court erred as a matter of law in concluding that the defense opening statement was in "bad faith" and improper, that the trial court failed to exercise discretion when it delegated the mistrial decision to the prosecutor, and that the trial court acted precipitously in granting the mistrial, failing to provide any opportunity for research and deliberation.

1. The Trial Court's Mistrial Decision Was Not An Exercise of "Sound Discretion" Because The Defense Opening Statement Was Not Improper.

This Court has long established that an opening statement summarizing, in good faith, the anticipated admissible testimony of a witness is proper even though

the witness ultimately decides to not testify. *Frazier v. Cupp*, 394 U.S. 731 (1969). There are many legitimate reasons why testimony summarized in an opening statement might not ultimately be presented at trial: a witness may not show up, the witness may testify differently from what the lawyer expected, the lawyer may neglect to call the witness, the lawyer may determine in the course of the trial that, for a variety of reasons, the witness need not be called, or, as in *Frazier* and Moeck's case, the witness may claim a privilege that precludes his testimony. No lawyer can determine, with certainty, at the time of giving an opening statement, what the testimony will actually be. A lawyer can only summarize what he or she reasonably *anticipates* the admissible testimony to be.

The State has never asserted that the opening statement in this case was not in "good faith." The petition acknowledges that Moeck's defense counsel assumed that Moeck would testify (*Petition* at 3), and that the opening statement was a summary of this anticipated testimony (*Petition* at 4). The Wisconsin Supreme Court recognized that the case does present the question of a "bad faith" opening statement, and did not address that issue. The State continues to assert, however, without providing a single supporting authority from any State or federal jurisdiction, that the defense opening was improper, and has framed the question presented as involving, like *Arizona v. Washington*, an improper defense opening statement. Because the defense opening statement was entirely proper, the trial court failed to exercise the "sound discretion" required by *Washington* when it concluded that a lawyer who summarizes,

in opening argument, the anticipated testimony of a defendant must be absolutely certain that the defendant will testify.

(a) Under *Frazier v. Cupp*, 394 U.S. 731 (1969), An Opening Statement That Summarizes Anticipated, Admissible Testimony But Fails To Produce That Testimony Is Not Improper.

In *Frazier v. Cupp*, 394 U.S. 731 (1969), the United States Supreme Court addressed the meaning of a "good faith" opening statement, when an attorney refers to testimony that is ultimately not produced at trial. In *Frazier*, prior to trial, defense counsel warned the prosecutor not to refer, in his opening statement, to the expected testimony of Rawls, a codefendant, because Rawls would invoke his privilege against self-incrimination if called to testify. The prosecutor then spoke with a probation officer and police officer, who both indicated that Rawls would testify. In his opening statement, the prosecutor included a summary of Rawls' testimony. The summary "took only a few minutes to recite." *Frazier* at 733. The defense moved for a mistrial at the close of the opening statement and this was denied. Rawls later invoked his privilege and did not testify, and the mistrial motion was renewed and again denied. A curative instruction was given, informing the jury that the remarks of counsel are not evidence. *Frazier* at 734.

Frazier argued on appeal that the prosecutor's summary of Rawl's testimony could have been viewed by the jury as testimony and that he was denied his right of confrontation and cross-examination. The Court upheld the conviction, concluding

that the prosecutor's opening statement was an objective summary of evidence that he reasonably expected to produce, and that it is reasonable to assume that the jury will limit its consideration to the evidence produced, when a proper limiting instruction has been given.

The *Frazier* court's conclusion that it is entirely permissible for an attorney to refer, in an opening statement, to testimony that he reasonably expects to produce, even though that evidence may ultimately not be produced, is consistent with standards of professional conduct governing counsel's conduct in giving an opening statement. The American Bar Association Standards for Criminal Justice, Standard 4-7.4, The Defense Function, Opening Statement, provides that the opening statement should be limited to "a brief outline of the issues and the matters counsel believes can be supported with competent and admissible evidence." The commentary to this Standard provides that "if, through honest inadvertence, counsel's proof falls significantly short of the opening statement, the court should be asked to give a clarifying instruction." Similarly, the American Bar Association Code of Professional Responsibility, DR7-106(C)1 provides that a lawyer shall not "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." These standards do not in any way preclude a lawyer from referring in the opening statement to admissible evidence that the lawyer reasonably expects to produce.

nce that

(b) The Trial Court Failed to Exercise "Sound Discretion" Because The Mistrial Decision Was Based On The Erroneous View That the Defense Opening Statement Was Improper.

The trial court based the mistrial decision on an error of law when it concluded that any opening statement that summarizes anticipated testimony but then fails to produce that testimony is an improper, "bad faith" opening statement. At the jury instruction conference, the prosecutor suggested that it was unethical for defense counsel to summarize anticipated testimony by the defendant and then not produce it (*Pet. App., A86).* In response, defense counsel noted that opening statements are not evidence, that he is permitted to tell the jury what he believes his client will testify to, and that the final decision about whether the client will testify is not made until after the State has presented its case (*Pet. App., A86).* Without providing any opportunity for the attorneys to research or address further the meaning of a "good faith" opening argument, the trial court concluded "I don't think your statement of the law is correct. You can't tell the jury what the evidence is gonna show and then don't show it." (*Pet. App., A87).* The court stated that if a defense lawyer doesn't know for sure whether his client is going to testify, he can not give the defendant's version of the events in the opening statement (*Pet. App., A87*). The trial court's written decision denying Moeck's motion to dismiss on double jeopardy grounds again reiterated this erroneous view of "good faith":

> If Mr. Gaskell was unsure as to whether or not Mr. Moeck would testify when he presented his opening statement, he should not have brought out Mr. Moeck's version of the incident in his opening statement.
>
> *Pet. App., A95..*

On appeal, the State has never advanced the trial court's erroneous view of a "bad faith" opening argument. The Wisconsin Supreme Court noted that "the State does not contend that defense counsel was engaging in gamesmanship or sandbagging or acting in bad faith when defense counsel made opening statements at the defendant's third trial" (*Pet. App., A20).* The Court noted:

> The State does not contend that defense counsel's opening statement was in bad faith, that is, the State does not contend that defense counsel had a reasonable basis to believe that his opening statement would not be supported by admissible evidence. The defendant's position in the present case is that defense counsel's opening statement was offered with the reasonable expectation that the defendant would testify and that the opening statement conformed to the defendant's testimony in the prior trials. Defense counsel asserted that he expected the defendant to testify (as the defendant had in prior trials), but he did not know in fact whether the defendant would testify.
>
> Because this case does not raise the issue of an attorney's making an opening statement in bad faith, we do not address that circumstance.
>
> (*Pet. App., A21, par. 65).*

The trial court's mistaken view of a "good faith" opening argument was the basis for the grant of the mistrial. Under *Washington*, the trial court failed to exercise "sound discretion" because, pursuant to *Frazier v. Cupp*, the court erred as a matter of

law in concluding that the defense opening statement was in "bad faith" and improper.

2. The Trial Court's Mistrial Decision Is Not Entitled "Special Respect" Under *Washington* Because The Defense Opening Statement Was Not Improper

The Wisconsin Supreme Court accorded "special respect" to the trial court's mistrial decision because Moeck's case, like *Washington*, involves a defense opening statement (*Pet. App., A13, par. 41*). Unlike in *Washington*, however, where the defense opening referred to *inadmissible* evidence that attacked the integrity of the prosecution, the defense opening in Moeck was entirely proper. A reviewing court, therefore, could apply a stringent standard of appellate review, consistent with the spectrum of review levels set forth in *Washington*, particularly because there exists "reason to believe" that the prosecution sought the mistrial in Moeck's case in order to take advantage of its failure of proof.

In *Arizona v. Washington*, the Court "start[ed] from the premise that defense counsel's statement was improper . . .." *Id.* at 511. The *Washington* Court's analysis of the issue is fundamentally grounded on the *inadmissibility* of the evidence referred to, and the resulting *impropriety* of the opening statement. The Court adopted a strict standard of appellate review of mistrials based on defense misconduct to avoid impeding the trial court's duty to preserve the integrity of the trial process when such order is threatened by professional misconduct:

precisely

> Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct."
>
> *Washington*, 434 U.S. at 512-513 (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976).

Unlike in *Washington*, Moeck's case does not involve defense misconduct or a "bad faith" opening argument. As noted in part II, below, throughout all the litigation of this matter in the Wisconsin courts and now before this court, the State has failed to provide a *single* authority, either in State or federal case law, recognized practice standards, or academic literature, suggesting that it is improper for an attorney to summarize the anticipated, admissible testimony of a witness in an opening statement. *Washington* approved a narrow or strict standard of appellate review for mistrial decisions based on attorney misconduct, to avoid impeding the trial court in responding to such misconduct. In a case that does not involve defense misconduct, such a strict appellate review standard is unnecessary.

Petitioner notes, correctly, that when defense counsel summarizes the anticipated, admissible testimony of the defendant in opening statement, but then fails to produce that testimony, the defense can be devastated, resulting in "compelling ineffective assistance of counsel challenges" on appeal (*Pet. at 26*). It is

precisely this possibility for bias against the defense that sets Moeck apart from a situation like that in *Washington*, involving improper defense conduct. Where improper defense conduct is involved, only the State faces possible bias as a result of that conduct. In *Washington*, for example, the State faced bias as a result of an argument referring to inadmissible evidence that the State had suppressed and hidden evidence in earlier proceedings in the case. The improper argument was a direct attack on the integrity of the State, threatening the fairness of the proceedings. In contrast, the situation that developed when Moeck decided to not testify produced the possibility of bias both against the State and, even more so, against the defense. Substantial authority recognizes the tactical disadvantage to the defense if promised evidence is not produced. Perrin, "*From O.J. to McVeigh: The Use of Argument in the Opening Statement*," 48 Emory L.J. 107, 132 (1999); Gianna and Julien, *Opening Statements 2d – Winning in the Beginning by Winning the Beginning*, sec. 8.3, at p. 8-5 (West 2004). The Wisconsin court of appeals also noted this, stating that an attorney's failure to produce promised evidence is not lost on the jury and can be devastating (*Pet. App, A71, par. 15*). While Moeck's decision to not testify may have hurt his case, given the evidence promised by counsel in his opening statement, both Moeck and his counsel were willing to take this risk because they were sure the State had lost its case. The State offers no explanation as to why defense counsel's violation of a general principle of effective advocacy amounts to an unethical or improper tactic that should provide grounds for the opposing party, who benefits from the poor advocacy, to obtain a mistrial.

3. The Trial Court's Mistrial Decision Is Not Entitled "Special Respect" Under *Washington* Because There Is "Reason To Believe" That the Prosecutor Sought The Mistrial To Achieve A Tactical Advantage Over Moeck.

In *Washington*, the Court determined that the "strictest scrutiny" is appropriate when "there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508. The Double Jeopardy Clause was designed to protect the individual from just such a circumstance, to prevent a retrial to allow the State to bolster a weak case:

> This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade v. Hunter*,336 U.S. 684; *Kepner v. United States*, 195 U.S. 100, 128. In general see American Law Institute, Administration of The Criminal Law: Double Jeopardy 61-72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.
>
> *Green v. United States*, 355 U.S. 184, 188 (1957).

This concern with preventing a prosecutor whose believes he or she has failed to prove his case from manipulating the trial to obtain a "second kick at the cat" is precisely the situation presented in Moeck's case. In Moeck's case, there exists substantial "reason to believe" that the prosecution decided to accept the mistrial option offered by the court in an effort to salvage a failed prosecution.

"I Believe"

First, the State's case hinged entirely on the credibility of the complainant, Sader, and the presentation of Sader's testimony had been a disaster, due to the number and nature of the inconsistencies between his trial testimony and his previous sworn testimony and statements. These were not "minor details" that one might normally expect from multiple opportunities to testify, but included major features of the alleged offense, including how and where Sader met Moeck, why Sader went to Moeck's apartment, whether the first alleged instance of sexual contact occurred while Moeck was standing up or was on a mattress, whether Moeck had his pants on or off during the alleged assaults, how many times and where Sader was allegedly slapped by Moeck, and whether the alleged robbery occurred in-between instances of alleged assault (while Sader was laying on a mattress) or at the very end of the encounter (while Sader was standing up facing a wall). All of these inconsistencies were effectively presented to the jury by defense counsel's cross-examination.

Second, defense counsel had effectively portrayed the appalling lack of investigation by Officer Abraham, including the failure to physically examine Sader, failure to collect his underwear, failure to collect biological evidence for possible DNA evidence, failure to follow up on inconsistencies in Sader's verbal and written statements, failure to search for physical evidence described by Sader, and failure to interview neighbors or bar patrons who might corroborate Sader's story.

Third, after the mistrial was declared, Moeck's counsel spoke outside the courthouse with Abraham, the investigating officer who assisted the prosecutor in the

presentation of the State's case, who was present with the assistant State's attorney when the mistrial decision was discussed with the elected district attorney (R242:4), and who indicated that he had done a much better job that Moeck's previous attorney and that that was why the state had requested a mistrial (A6).

Fourth, both Moeck and his counsel explained that the reason Moeck did not testify was because both he and Moeck believed that the State had failed to prove its case, and that Moeck's testimony was unnecessary. At the postconviction hearing, Moeck testified that, prior to the third trial he discussed with his attorney whether or not he would testify, and had decided "that I would testify in the third trial just as I had in the first two trials" (R248:156). Moeck stated that he made the decision to not testify as soon as the State rested:

> [W]e won that trial. There was no way that jury was going to convict me of anything, because the alleged victim in this case told so many lies, got caught up in so many lies.
>
> They found there was no investigation done in this matter, and there was no doubt in anybody's mind that we won that case. R248:156-157.

Similarly, Moeck's trial counsel explained the decision to not testify in similar fashion:

> The evidence in the cross examination of the State witnesses went extremely well in that case. And during the course of the trial, there were many, many inconsistencies within Mr. Sader's testimony. The case went very well. At the end of the State's case, the decision was basically made at that point that Rich would not take the stand. That there was no need for him to take the stand. R248:15.

Finally, the State acknowledged, at oral argument before the Wisconsin Supreme Court, that significant credibility attacks on Sader had been made at trial, stating, "Counsel repeatedly refers to the fact that oh, the state wanted a mistrial because its case was going badly. You bet its case was going badly."[4]

For all of these reasons, there exists significant "reason to believe" that the prosecution sought a mistrial to obtain a better opportunity to obtain a conviction after presenting a weak case at trial. Under such circumstances, consistent with *Arizona v. Washington*, the Wisconsin Supreme Court was not required to give "special respect" to the trial court's mistrial decision. The Wisconsin Court could have applied a much stricter standard of review than it did, and could have concluded that a mistrial was inappropriate because it would allow the State to do precisely what the Double Jeopardy Clause was designed to prevent.

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[4] The oral argument can be heard at: (http://www.courts.state.wi.us/supreme/scoa.jsp?docket_number=&begin_date=&end_date=&party_name=Moeck&sortBy=date). Counsel's comments are at 24:50-24:59 on the recording.

4. The Trial Court Delegated The Mistrial Decision To The Prosecutor.

The Wisconsin Court of Appeals concluded that the trial court committed an error of law by abdicating its discretion to the State, allowing the State to choose between a mistrial or proceeding to a verdict with a curative instruction (*Pet. App., A69, par. 13).* The Wisconsin Supreme Court noted that it did not need to determine whether the trial court delegated the mistrial decision to the State, in light of its conclusion that the trial court failed to exercise sound discretion in the areas noted above (*Pet. App., A23, par. 70).* The record of the trial court's mistrial decision, however, clearly shows that the court allowed the State to choose whether to proceed with the trial or obtain a mistrial. Notably, the State's summary of facts avoids any reference to this part of the record of the mistrial decision.

The prosecutor came to the jury instruction conference with a proposed curative instruction to address defense counsel's opening statement which summarized anticipated testimony by Moeck that was not produced when Moeck decided to not testify. It was the court, not the prosecutor, who suggested the mistrial option (A87). After discussion of and formulation of a curative instruction that was agreed to by all parties, the court offered the mistrial option to the State:

> THE COURT: *Do you want to go ahead or not?* I mean, I told her, it's on the record, I'm not gonna take it back, I think under – the State under the circumstances now would be entitled to a mistrial *if they wanted one.*
>
> (*Pet. App., A90).*

After the State indicated, "I think I'm gonna ask for a mistrial, Judge," and after further comment by defense counsel, the court again indicated that the decision about whether the trial would proceed or not rested entirely in the State's hands. The court asked: "Is that your final answer, Ms. Matousek?" (*Pet. App.*, A91). When the State responded "yes," the court declared a mistrial.

As the Wisconsin court of appeals recognized, there can be no finding of "manifest necessity" when the State is offered a choice between either mistrial or proceeding with trial and a cautionary instruction. The trial court's abdication of the mistrial decision to the State can only be viewed as a failure to exercise the "sound discretion" required by *Washington*.

5. The Trial Court Did Not Act Deliberately.

Under *Washington*, if a trial judge acts "irrationally or irresponsibly" in granting a mistrial, the mistrial is not an exercise of "sound discretion" and must be set aside. The Court explained why the trial judge in that case had not acted properly:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial.
>
> *Washington*, 434 U.S. at 515.

Unlike *Washington,* the trial court in Moeck failed to allow a full opportunity for research and deliberation on the mistrial issue. The question arose at 6:00 p.m., after a full day of trial. At that point, the court could easily have dismissed the jury for the night, allowing the parties to conduct some research. Without this opportunity, the court ordered a mistrial, apparently without even an awareness of the relevant legal standard, "manifest necessity." The court had no understanding of law relating to "good faith" opening statements, including *Frazier v. Cupp*, *supra*, to guide the court's assessment of whether the defense opening statement was improper. The court had no awareness of *United States v. Robinson*, 485 U.S. 25, 31-34 (1988) and decisions of the Wisconsin appellate courts in *State v. Keith*, 216 Wis. 2d 61, 80-83 (573 N.W.2d 888 (Ct. App. 1997), *State v. Johnson*, 121 Wis. 2d 237, 247-49, 358 N.W.2d 824 (Ct. App. 1984), and *State v. Edwardson*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988), which provide direction for allowing a prosecutor a measured response to a defense opening statement that failed to produce all of the anticipated testimony. The court had only read two cases involving mistrial, neither of which involved facts similar to the case before it, and the court was apparently even unaware of the "manifest necessity" standard, as no reference to that standard was made by either the attorneys or court in the discussion of the mistrial decision.

By not affording the parties an opportunity to research and deliberate the mistrial issues, the court was left to rule, as it candidly acknowledged, "off the top of my head" (*Pet. App., A89*). Under *Washington*, this failure to deliberate must be viewed as a failure to exercise the requisite "sound discretion".

after

II. The State Has Not Produced A Single Federal Or State Appellate Case Decided Contrary to *Moeck* Involving A Mistrial Granted After The Defense Opening Statement Referred, In Good Faith, To Anticipated, Admissible Testimony By The Defendant That Was Not Ultimately Produced.

This court should deny review because no conflict exists among the federal appellate courts or among the States with regard to the specific question presented in Moeck's case: whether the trial court failed to exercise "sound discretion" in granting a mistrial in a case in which the defense opening argument summarized, in good faith, the anticipated testimony of the defendant and where the defendant ultimately decided to not testify. The State has never, though all levels of litigation in the Wisconsin courts and now in its petition to this Court, produced a *single* federal or state appellate case that has upheld the grant of a mistrial based on a defense opening statement that summarized, in good faith, the anticipated, admissible testimony of a witness and where the defense then failed to called that witness. Every case that has addressed the question has concluded, consistent with *Moeck*, that a mistrial is not warranted under such circumstances. *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994)("manifest necessity" for a mistrial not established where defense counsel's opening statement provided a "Horatio Alger-like" account of defendant's life but testimony from the defendant was not presented to support such statements); *Spaziano v. State*, 429 So.2d 1344 (Fla. App.2 Dist. 1983) ("manifest necessity" for a mistrial not established when attorney in good faith expects his client to testify and gives an opening statement on the basis of that expectation). Simply put, no conflict exists between the Wisconsin Supreme Court's decision in *Moeck* and any other case

anywhere, federal or state, on this question. Review by this court, therefore, is not warranted.

The petitioner attempts to conjure up a "conflict" between the federal courts and between the States with regard to the level of deference to be accorded a trial court's mistrial decision. The various levels of deference that appellate courts have accorded to mistrial decisions, however, is precisely what this Court required in *Arizona v. Washington*. In *Washington*, the Court recognized that mistrial decisions and the appellate review of mistrial decisions are highly fact-specific, that there exists "a spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny." *Washington*, 434 U.S. at 510. Some mistrial decisions warrant strict scrutiny, some warrant great deference, and others fall along the line between these two extremes. Thus, it should not be surprising and indeed, it is only to be expected that appellate courts, following *Washington*, will accord varying levels of deference to trial courts' mistrial declarations.

Mistrial declarations are not fungible: each must be assessed on its own merits, with an eye toward preserving both a defendant's fundamental right against double jeopardy and the public interest in fair trials. The petition presents a mishmash of federal and state appellate decisions reviewing mistrials, without any effort to identify or explain the underlying facts of the cases which would shed light on where each case should fall on *Washington's* spectrum of deference (*Petition at 14-17*).

III. No Recurring Issue of National Importance Is Presented.

Petitioner argues that review is necessary to address a recurring issue of national importance. Petitioner's argument is based on the faulty premise that the "issue presented" involves mistrials based on defense errors. As explained above, while continuing to insist that this case involves an improper defense opening statement, the petitioner fails to present *any* authority, State or federal, in support of that view. The Wisconsin Supreme Court correctly determined that Moeck's case does not involve a "bad faith" opening argument, and the State has never asserted that it does involve "bad faith". This Court should not grant review to address a question not presented by the facts of the case for which review is granted.

CONCLUSION

For the reasons set forth above, the State has not articulated any compelling reason justifying this Court's discretionary review. Moeck has now served more than 5 years in prison in violation of his fundamental rights against double jeopardy. Moeck respectfully requests this Court to deny the State's Petition for Writ of Certiorari to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted this 27th day of September, 2005.

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In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

RICHARD A. MOECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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There are compelling institutional considerations at stake when an appellate court fails to give "special respect" to a trial judge's declaration of a mistrial in response to an improper opening statement by defense counsel that jeopardizes the State's right to a fair trial by an impartial jury. That high degree of deference is necessary, this Court said in *Arizona v. Washington*, 434 U.S. 497 (1978), because appellate second-guessing discourages mistrial declarations even when the trial judge fears a fair trial by an impartial jury has been compromised. The trial judge knows that a wrong judgment call (a) could result in an unjust acquittal

that cannot be reversed even if a mistrial should have been declared in hindsight, or (b) could allow a defendant found guilty on retrial to walk free if an appellate court concludes a mistrial should not have been declared in hindsight.

The Wisconsin Supreme Court failed to abide by the rule adopted in *Arizona v. Washington* and instead second-guessed a trial judge's reasonable exercise of discretion. In doing so, the Wisconsin Supreme Court exacerbated a conflict among the courts over the meaning and application of that decision. Moreover, Wisconsin prosecutors will now be reluctant to request mistrials even when they should, and trial judges will be reluctant to exercise discretion in favor of mistrials even when they should. The result will be unjust acquittals by tainted juries for which the State has no recourse. This scenario would defeat "the ends of public justice." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

Moeck's Brief in Opposition ("Br. in Opp.") utterly ignores the policy concerns underlying *Arizona v. Washington*, misstates the holding of that case, and concedes the existence of a conflict. Certiorari is warranted for the reasons set forth in the Petition.

I. STATE AND FEDERAL COURTS ARE DIVIDED AS TO THE DEGREE OF DEFERENCE OWED A MISTRIAL DECLARATION IN THE FACE OF DEFENSE MISCONDUCT.

Moeck concedes that there are "various levels of deference that appellate courts have accorded to mistrial decisions." Br. in Opp. at 37. That is precisely why this Court's review is urgently needed. The standard of appellate review of a mistrial declared in response to defense error was

seemingly resolved by *Arizona v. Washington*, yet confusion persists among the lower courts. As pointed out by the State, some appellate courts review the question of "manifest necessity" *de novo*. Others treat the issue as a mixed law and fact question with the legal component being subject to *de novo* review. Still others give great deference to the trial judge's exercise of discretion as, the State submits, this Court in *Arizona v. Washington* intended. *See* Pet. 14-21.

Moeck's only response is to assert that none of the cases cited by the State reached the result advocated by the State here, *i.e.*, upheld the declaration of a mistrial in response to improper opening statements by defense counsel. Br. in Opp. at 36. Not true. Several of the cases cited in the Petition faithfully adhered to *Arizona v. Washington* and deferred to trial court mistrial declarations under similar circumstances. *See* Pet. 17-18 & n.4.[1]

Moreover, the Brief in Opposition inadvertently highlights the conflict among the courts through its assertion (Br. in Opp. at 20-28) that the appellate deference mandated by *Arizona v. Washington* only applies to defense counsel error made in bad faith. We explain in § II, *infra*, why that assertion is incorrect. What matters for present purposes is that a split of authority has developed on whether the good or bad faith of defense counsel is a relevant factor in assessing the need for a mistrial.[2]

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[1] *See, e.g., Tubbs v. State*, 583 S.E.2d 853, 857-58 (Ga. 2003); *Grimes v. McAnulty*, 957 S.W.2d 223, 224-25 (Ky. 1997); *Lovett v. Commonwealth*, 472 N.E.2d 236, 238-39 (Mass. 1984); *State v. Levison*, 510 N.W.2d 495, 497-500 (Neb. Ct. App. 1993). *Also see State v. Colvin*, No. 04AP-421, 2005 WL 704818, *9-*10 (Ohio Ct. App. March 29, 2005) (upholding mistrial declared in response to improper defense closing argument).

[2] A number of courts consider the good or bad faith of defense counsel to be relevant. *See United States v. Sloan*, 36 F.3d 386, 397-400

(footnote continued)

II. THE WISCONSIN SUPREME COURT FAILED TO APPLY THE DEFERENTIAL STANDARD OF REVIEW REQUIRED BY *ARIZONA V. WASHINGTON.*

Arizona v. Washington made clear that the "highest degree of respect," that is, "special respect," must be given a trial judge's mistrial declaration. 434 U.S. at 510-11. This is the same "great deference," *id.* at 514, to which mistrial declarations based on hung juries are entitled, and is designed to prevent appellate courts from second-guessing discretionary mistrial judgments made by trial judges. *Id.* at

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(4th Cir. 1994) (defendant did not testify after counsel presented a "Horatio Alger" story of his life in opening statements; no "manifest necessity" because counsel acted in good faith and the jury could be instructed to disregard the story); *Jackson v. State*, 855 So. 2d 178, 180 (Fla. Dist. Ct. App. 2003); *Quinones v. State*, 766 So. 2d 1165, 1170-71 (Fla. Dist. Ct. App. 2000); *Spaziano v. State*, 429 So. 2d 1344, 1346 (Fla. Dist. Ct. App. 1983) (defense attorneys have the right to summarize the defendant's anticipated testimony and then, absent bad faith, change strategy and not put him on the stand; the instruction that opening statements are not evidence will remedy the situation). S*ee also Johnson v. Karnes*, 198 F.3d 589, 596-97 (6th Cir. 1999) (defense counsel in good faith believed he had a legitimate basis for asking the erroneous questions, the prosecutor objected but did not ask for a mistrial at first, and the prosecutor warned the trial court about double jeopardy ramifications of a mistrial).

Other courts focus on the potential adverse impact of the defense error on the ability of the jury to render a fair and impartial verdict. *See United States v. Shaw*, 829 F.2d 714, 718-20 (9th Cir. 1987) (an improper defense opening statement can create a "manifest necessity" if it creates a potential for jury bias); *Tubbs v. State*, 583 S.E.2d at 857-58; *Sinkfield v. State*, 458 S.E.2d 664, 665 (Ga. Ct. App. 1995) (improper questions of a witness by defense counsel, even if asked in good faith, supported mistrial declaration); *Grimes v. McAnulty*, 957 S.W.2d at 224-25; *Lovett v. Commonwealth*, 472 N.E.2d at 238-39; *State v. Levison*, 510 N.W.2d at 499-500; *Haight v. State*, 533 S.W.2d 510, 512 (Ark. 1976).

509-10. Absent such deferential review, the bar of double jeopardy would award defendants the windfall of no further prosecution for their alleged crimes. In this case, Moeck received precisely that windfall, based on nothing more than the Wisconsin Supreme Court's conclusion—applying essentially *de novo* review—that the trial judge need not have declared a mistrial. As demonstrated in the Petition (at 9-13), the court's decision amounted to a blatant disregard of the dictates of *Arizona v. Washington*. Moeck responds in a variety of ways, none of which has merit.

1. Moeck argues that "the Wisconsin Court determined that the trial court erred as a matter of law in concluding that the prosecutor would be unable to effectively countermand the defense opening statement." Br. in Opp. at 16. The Wisconsin Supreme Court was not, in fact, criticizing the trial judge for making an error of *law*; it was criticizing the trial judge for making an error of *judgment* or *discretion*. The Wisconsin Supreme Court agreed with the trial judge that (1) the opening statement was flawed; (2) the jury's misperceptions caused by the opening statement needed to be corrected; and (3) Fifth Amendment concerns limited, to an extent, the prosecutor's ability to eliminate juror bias in her closing arguments. Pet. App. A20-21, ¶¶62-63; A22, ¶¶67-68; A24, ¶74. *Also see id.* at A26, ¶77 n.47.

The only disagreement the Wisconsin Supreme Court had with the trial judge was over whether the prosecutor's closing argument and any curative instructions would satisfactorily cure the jury's misperceptions. That is precisely the type of judgment call *Arizona v. Washington* instructs must be given "special respect" by appellate courts. 434 U.S. at 510. The lesson of *Arizona v. Washington* is that the trial judge is in a far better position to make that judgment call as to the proper remedy for curing jury bias than is an appellate court.

To be sure, as Moeck asserts (Br. in Opp. at 13-14), this Court in *Arizona v. Washington* instructed appellate courts to review whether the trial judge exercised "sound discretion." 434 U.S. at 514. But the Court almost immediately thereafter explained that a trial judge fails to exercise "sound discretion" only when he or she acts "irrationally or irresponsibly," *id.* at 514, words perfectly consistent with granting trial judges a high degree of deference. Indeed, to read the opinion any other way would render it meaningless. Surely, the reference in *Arizona v. Washington* to "sound discretion" did not convert the highly deferential review mandated earlier in the opinion into virtually *de novo* review, where the appeals court simply substitutes its judgment for that of the trial judge in the name of "sound discretion."

It should be plain that the Wisconsin Supreme Court did not give "special respect" or any deference whatsoever to the trial judge's sound exercise of discretion. The court's analysis reveals that, while it paid lip-service to *Arizona v. Washington*'s principles, it launched into full independent record review for reasons to undermine, rather than uphold, the trial judge's sound exercise of discretion.

2. Moeck devotes considerable space to arguing that the rule announced in *Arizona v. Washington* is limited to cases where, unlike here, defense counsel presented the offending opening statement in bad faith. Br. in Opp. at 20-28. That is a manifestly erroneous reading of *Arizona v. Washington*, which teaches that the good or bad faith of defense counsel is irrelevant. The only issue is whether the offending opening statement adversely affected the State's right to a fair trial by an impartial jury. 434 U.S. at 510-13. *See also id.* at 513 n.32 (giving deference to trial judge's exercise of discretion in assessing potential jury bias "is not intended as a comment upon the conduct of defense counsel in this case").

This Court equated the declaration of a mistrial in response to improper opening statements by defense counsel with the declaration of a mistrial caused by a deadlocked jury. 434 U.S. at 509-10. Just as a deadlocked jury is usually no one's fault, the motive behind an unsubstantiated opening statement is beside the point when a trial judge is faced with assessing its impact on the right to a fair trial by an impartial jury.

3. Moeck attempts to distinguish *Arizona v. Washington* on the further ground that, in contrast to that case, here defense counsel did nothing wrong in his opening statement. Br. in Opp. 22-28. In Moeck's view, it is perfectly proper for a defense attorney to promise his client's testimony, summarize that testimony in great detail, contrast it with the victim's account, and then fail to present any evidence at trial to support that summary. This argument does not withstand even cursory scrutiny.

Critically, the Wisconsin Supreme Court did not agree with Moeck that this was a proper opening statement. Both the majority and the dissent recognized that defense counsel created a problem at trial that had to be remedied in order to protect the State's right to a fair trial by an impartial jury. Pet. App. A22, ¶68 (as a matter of state law, a mistrial can be declared "on the basis of an opening statement that summarizes evidence that is not produced"); A28-29, ¶¶82-83 (Wilcox, J., dissenting); A58-62, ¶¶165-76 (Prosser J., dissenting). They disagreed only as to whether the trial judge's mistrial order was an appropriate remedy. That fully disposes of Moeck's argument. *See Arizona v. Washington*, 434 U.S. at 511 (rejecting the defendant's assertion that the opening statement at issue was proper, holding that this argument was foreclosed by "the state court's interpretation of its own law").

Moeck relies on *Frazier v. Cupp*, 394 U.S. 731 (1969), for the proposition that a mistrial can never be based on an improper opening statement absent bad faith by defense counsel. Br. in Opp. at 20-26. That is an absurd proposition which, not surprisingly, this Court did *not* adopt in *Frazier*. The Court simply held that the prosecutor's brief reference in opening statements to the anticipated testimony of a codefendant who never testified did not justify reversal of petitioner's conviction. 394 U.S. at 733-37. That is all.

In the end, Moeck himself concedes the problem his improper opening statement created:

> Petitioner notes, correctly, that when defense counsel summarizes the anticipated, admissible testimony of the defendant in opening statement, but then fails to produce that testimony, the defense can be devastated, resulting in "compelling ineffective assistance of counsel challenges" on appeal (*Pet. at 26*).

Br. in Opp. at 27.

Conduct by defense counsel that might lead to reversal following a conviction is without question the sort of conduct that can create a manifest necessity for a mistrial. After all, "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached *but would have to be reversed on appeal due to an obvious procedural error in the trial*." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973) (emphasis added).

Moreover, Moeck acknowledges, at page 28 of his brief, that his opening statement risked biasing the jury against both the State and the defense.